No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF STATE APPELLANT

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I.
THIS ACTION IS RIPE FOR JUDICIAL REVIEW

A.

Appellee contends that, since Texas has no current plan to appoint a master or a management team to a specific school district, the issue of whether this is a change affecting voting is not ripe for judicial review. Yet these concerns did not prevent the Assistant Attorney General for the Civil Rights Division[1] from reviewing the statutory provisions, making the legal conclusion that these provisions were changes affecting voting,[2] and preclearing them[3] as "enabling in nature."[4] Since

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[1] 28 C.F.R. § 51.3 delegates the responsibility and authority for determinations under § 5 to the Assistant Attorney General, Civil Rights Division. In some circumstances, the Chief of the Voting Section can act on behalf of the Assistant Attorney General. The preclearance letter that Texas received was signed by the Acting Chief of the Voting Section. J.S. App. at 35a-38a.

[2] 28 C.F.R. § 51.35 provides that the Attorney General will notify a submitting party that their submission was inappropriate because the changes did not affect voting. Here, the Attorney General did not so notify Texas. To the contrary, it was the Attorney General that identified these provisions as changes affecting voting; Texas had not originally identified them as such because the State did not believe them to be changes affecting voting. Brief of State Appellant at 11-13; Brief for the United States at 7-9.

[3] Brief for the United States at 8-9; J.S. App. at 35a-38a.

[4] 28 C.F.R. § 51.15(a) states:

> With respect to legislation (1) that enables or permits the State or its political subunits to institute a *voting change* or (2) that requires or enables the State or its political sub-units to institute a *voting change* upon some future event or if they satisfy certain criteria, the failure of the

the Assistant Attorney General must abide by the decisions of this Court and other federal courts in making her legal determinations under § 5,[5] there is no reason why the issue is ripe enough to allow the Assistant Attorney General to make this legal judgment, but not ripe enough for a judicial tribunal to do so.

Because the Attorney General has already decided that the appointment provisions are changes affecting voting, the Appellee's ripeness argument applies to the issue of whether a specific appointment has a discriminatory purpose or effect, not to the predicate question of whether the provisions are changes affecting voting. In short, Appellee's argument simply begs the question: It assumes that the provisions allowing for the temporary appointment of a master or management team are changes affecting voting.

B.

Likewise, Texas' claim that §§ 39.131(a)(7) and (8) are authorized under the Educational Flexibility Partnership Act ("Ed-Flex") and, for this reason, are not changes affecting voting, is ripe. This issue requires the interpretation of federal statutory law, independent of any specific placement of a master or management team.

> Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular *voting change* that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(Emphasis added).

[5] 28 C.F.R. § 51.56.

Appellee's reliance on *Young v. Fordice*, 117 S.Ct. 1228 (1997) is misplaced. *Young* involved implementation of the National Voter Registration Act, which specifically required states to implement changes in voting procedures. Unlike the statute in *Young*, §§ 39.131(a)(7) and (8) of the Texas Education Code are *not* changes relating to voting. Sections 39.131(a)(7) and (8), like the counterpart provisions in 20 U.S.C. § 6317(d)(6)(B), relate to *education*. The Commissioner of Education must have the authority to appoint temporarily a master or a management team to assist deficient school districts for the good of the school children in those districts.

Moreover, Appellee argues that Ed-Flex does not authorize waivers of requirements that are applicable to state educational agencies. *See* Brief for United States at 41 n.13.[6] This argument, if true, is unavailing because even if Texas were not authorized to waive the federal requirements, 20 U.S.C. § 6317 would then apply and it requires the State to take certain corrective action during the fourth year of the deficiency, which includes the appointment of a "receiver or trustee to administer the affairs [of a school district]..." 20 U.S.C. § 6317(d)(6)(B)(i)(IV); J.S. App. at 84a-85a (emphasis added).

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[6] Appellee's contention is based on a July 25, 1997 letter from the Department of Education to the Texas Commissioner of Education, App. to Brief for United States, at 1a-3a, that is not part of the record. The July 25, 1997 letter responds to a May 19, 1997 letter from the Texas Commissioner of Education, in which he seeks clarification on whether the Texas Education Agency could grant itself waivers of *administrative* requirements of the Ed-Flex program. Moreover, the Ed-Flex statute specifically permits a state educational agency to waive the requirements of federal law. 20 U.S.C. § 5891(e)(2)(A); J.S. App. 56a-57a. The Secretary's interpretation of a federal statute cannot be substituted for the clear language of the statute.

II.
JURISDICTION WAS PROPER IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Jurisdiction was and is proper in the District Court for the District of Columbia pursuant to 42 U.S.C. § 1973c, which provides that a covered jurisdiction "may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such a qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..." Appellee concedes that the District Court for the District of Columbia does have jurisdiction over coverage issues when such a claim is part of a preclearance action.[7] Appellee now argues,[8] however, that this provision does not confer jurisdiction on the District Court for the District of Columbia for the coverage issue brought by Texas.

Declaratory judgment actions under § 5 involve two issues: (1) whether the statutory provision is a change affecting voting, and (2) if it is a change affecting voting, whether such a change has a discriminatory purpose and effect. *Presley v. Etowah*

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[7] Brief for the United States at 20 ("To hold otherwise would be to impose a pointless requirement on a covered jurisdiction.").

[8] Although jurisdiction can be raised at any time during litigation, the Appellee chose not to do so. Rather, Appellee admitted jurisdiction in its Answer, *see* Answer, para. 2, informed the District Court for the District of Columbia that it "did not oppose the plaintiff's motion that a three-judge court be empaneled to hear and decide this action," United States' Response to Order to Show Cause at 14, and failed to mention any concern about jurisdiction in its Motion to Affirm, which it filed with this Court.

County Commission, 502 U.S. 491, 500-06 (1992).[9] The predicate question is not an issue in the vast majority of cases. However, the right to have the District Court for the District of Columbia decide whether the Attorney General is correct in her legal determination that an enactment is a change affecting voting in cases in which she has precleared the enactment is no less important than the right the State has to obtain preclearance from that court in cases in which the Attorney General objects to preclearing a change affecting voting. *See Reno v. Bossier Parish School Board*, 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring).

Further, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court recognized that the importance of federalism requires a three-judge panel to determine whether a state statute is covered under § 5 of the Voting Rights Act:

> We conclude that in light of the extraordinary nature of the [Voting Rights] Act in general, and the unique approval requirements of § 5, Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

Allen, 393 U.S. at 563.

As in *Allen*, the issue here is whether a state enactment is subject to § 5. There is no reason 42 U.S.C. § 1973c should be interpreted to allow both a private litigant and the Attorney General to obtain judicial review of the legal question of whether a state enactment is a change affecting voting, but to deny a state an opportunity to obtain that same judicial review.

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[9] Appellee agrees with this analysis. United States' Response to Order to Show Cause at 5 ("Section 5 coverage determinations involve two basic components: first, does the practice or procedure at issue affect voting; and second, is there the potential for discrimination? (citation omitted)").

The reasoning in *Allen* supports Texas' right to such judicial review. *Allen*, 393 U.S. at 562 ("The clash between federal and state power and the potential disruption to state government are apparent. *There is no less a clash and potential for dispute when the disagreement concerns whether a state enactment is subject to § 5.")* (emphasis added). Here, the suit brought by Texas involves the precise federal-state confrontation addressed in *Allen*.

Texas believes that the Attorney General's error of law has resulted in an unconstitutional application of § 5 of the Voting Rights Act. In such an instance, Texas has a right to have the District Court for the District of Columbia review the Attorney General's legal determination that the appointment of a master or management team is a change affecting voting. If Texas were to be barred from obtaining judicial review of its legal "disagreement concern[ing] whether a state enactment is subject to § 5," *Allen, supra,* at 562, then the unconstitutional application of § 5 could never be corrected. In short, the Department of Justice would be unfettered to arrogate for itself more authority than Congress ever intended it to have to interfere with the routine, non-election related matters of state government.[10] *Presley v. Etowah County Commission*, 502 U.S. 491, 506 (1992) ("The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate

[10] To those that suggest that Texas' declaratory judgment action in these circumstances, if allowed, would open the floodgates to litigation, the answer is two-fold: first, such actions are limited only to circumstances such as this where the Attorney General has wrongly determined that a state enactment is a change affecting voting and, preclears the enactment as enabling legislation, thereby requiring the state to submit each application of the enactment for preclearance; and, second, remedying a constitutional wrong must not take a backseat to mere prudential concerns.

sphere: voting.") Thus, the District Court for the District of Columbia has jurisdiction over the action filed by Texas.

III.
THE ISSUE WHETHER §§ 39.131(A)(7) AND (8) ARE CHANGES AFFECTING VOTING WITHIN THE SCOPE OF § 5 IS "FAIRLY INCLUDED" IN THE RIPENESS ISSUE AND PROPERLY BEFORE THE COURT

Finally, in the event this Court concludes both that the district court has subject-matter jurisdiction and that the case is ripe, Appellee urges this Court to remand the case to the district court. Remand is appropriate, Appellee argues, because factual development is needed to determine whether placement of a master or management team would result in a *de facto* replacement of an elective office with an appointive one. Brief for United States at 42-43.

Certainly, at the very least, the State is entitled to a remand. But a remand here is not necessary because no factual development is needed to determine, as a matter of law, that the temporary placement of a master or management team, with powers expressly limited by § 39.131(e), is not a change affecting voting, and is, therefore, not covered by § 5 of the Voting Rights Act.

Moreover, the issue of whether the temporary placement of a master or management team falls within the scope of § 5 is "fairly included" within the ripeness question presented in Texas' Jurisdictional Statement, SUP. CT. R. 14.1(a), and in Brief of State Appellant. SUP. CT. R. 24.1(a).[11] In determining

[11] This Court routinely considers issues which are essential to analysis of the issue presented as "subsidiary issues 'fairly comprised' by the question." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). *See also United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

whether this case is ripe for adjudication, this Court must consider the same factors it would consider in determining whether §§ 39.131(a)(7) and (8) relate to voting.

Nor would consideration of the question surprise or prejudice Appellee. To the contrary - Appellee is well aware of Texas' position and Texas' arguments. Texas raised the coverage issue in the district court below, *see* Texas' Motion for Summary Judgment, and Appellee responded to it. *See* United States' Opposition to Texas' Motion for Summary Judgment. Texas discussed the coverage issue again in detail in its Jurisdictional Statement, J.S. at 2-5, 6-7, 10, 13-20, and in the Brief of State Appellant. Brief of State Appellant at 2-11, 13, 15-18, 20-41. Moreover, the record is adequate to determine whether §§ 39.131(a)(7) and (8) relate to voting.

CONCLUSION

Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that TEX. EDUC. CODE §§ 39.131(a)(7) and (8), as limited by § 39.131(e), are not changes affecting voting, and do not have to be submitted for preclearance under § 5 of the Voting Rights Act.

Respectfully submitted,

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